JEOU-SHUN INDUSTRIAL CO. LTD.

v.

SHUANG HOR ENTERPRISE (M) SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' DR. ZAKARIA M. YATIM J.
[CIVIL SUIT NO. D4-22-1144-1993]
24 OCTOBER 1994

INJUNCTION : *Application to set aside ex-parte injunction - Injunction granted prior to coming into force of amendment to O. 29 r. 2, Rules of the High Court 1980 - Defendant raising preliminary point - Whether amendment to O. 29 r. 2 of retrospective effect - Whether injunction obtained had automatically lapsed - Whether amendment to O.29 affects a substantive right of the plaintiff - Consideration of s. 30(a),(b) and (d) of Interpretation Act - Whether ex-parte injunction still remains in force until it is set aside by the Court.*

The plaintiff obtained an *ex-parte* order restraining the defendant from importing into Malaysia for distribution, supplies and sales a product bearing the plaintiff's trade mark. The injunction was obtained before the coming into force of the new r. 2(B) of O. 29 Rules of the High Court 1980.

The defendant applied to set aside the *ex-parte* interim injunction. At the hearing of the application, learned Counsel for the defendant raised a preliminary point and argued that as O. 29 r. 2(B) is procedural in nature it should have retrospective effect which would mean that the *ex-parte* order obtained by the plaintiff had lapsed.

Counsel for the plaintiff, on the other hand, submitted that O. 29 r. 2(B) does not have any retrospective effect and he relied on s. 30(a),(b) and (d) of the Interpretation Act. Counsel contended that when the plaintiff obtained the *ex-parte* injunction, he had a vested right and that such vested right gave the plaintiff a right to remedy.

The Court was called upon to decide whether the amendment to O. 29 was of retrospective effect and in doing so had to decide whether the said amendment affects any right, privilege, obligation or liability acquired, accrued or incurred that existed prior to the amendment.

Held:

[1] The amendment to O. 29 was made by the Rule Committee under s. 17 of the Courts of Judicature Act 1964 with the consent of the Chief Justices of Malaya and Borneo. It is therefore clear that the amendment falls within the definition of the term "the repeal of the written law" in s. 30(1) of the Interpretation Act.

[2] The plaintiff by filing the writ is seeking the remedy of the Court to protect what it claims to be its right. It is axiomatic that the power of the Court to grant an injunction can only be exercised in support of a right which the plaintiff has or, for interlocutory purposes, show that he probably has such a right. In the circumstances, Counsel had rightly submitted that the plaintiff's right was protected and preserved under the *ex-parte* order until the order is set aside.

[3] The plaintiff, by filing a writ and statement of claim and by obtaining the *ex-parte* order had a vested right prior to the amendment, and the amendment therefore should not affect such right. In the absence of any express words in the new r. 2(B) of O. 29 that it should apply retrospectively, the Order therefore must be construed to apply prospectively.

[4] Under s. 30(1)(a) of the Interpretation Act the amendment should not affect the previous operation of the repealed law or anything duly done or suffered thereunder. In the present case, the writ was filed and the *ex-parte* injunction obtained under the law that existed before the amendment. In the circumstances of the present case the amendment should not apply retrospectively.

[5] Section 30(1)(d) of the Interpretation Act allows legal proceedings instituted before the amendment to continue despite the amendment. In the present case, apart from filing the writ and obtaining the *ex-parte* order, the plaintiff has also filed an application for contempt proceedings. If the amendment were to be given a retrospective effect, the act of contempt would not amount to contempt anymore, and it would amount to putting right that which was wrong.

[Preliminary point overruled. Ex-parte order remains in force until set aside by the Court]

Cases referred to:
Malayan Banking Bhd. v. Siong Electronic Industries 91981) Sdn. Bhd. [1994] 1 MLJ 704 ***(refd)***
Fennbend Ltd v. Millar [1988] 20 HLR 19 ***(refd)***
Yew Boon Tew v. Kenderaan Bas Mara [1982] 3 All ER 833 ***(refd)***
James Gardner v. Edward A. Lucas and Others [1878] 3 AC 582 ***(refd)***

Legislation referred to:
Rules of the High Court, 1980, O. 29 r. 2B
Interpretation Act, ss. 3, 30 (1) (a) (b),(d)
Courts of Judicature Act 1964, s. 17

For the plaintiff - S.F. Wong, M/s. Christina Chia Ng & Partners.
For the defendant - M. Nagarajah, M/s. Shook Lin & Bok.

JUDGMENT

Dr. Zakaria M. Yatim J:
This is an application by the defendant for an order:

1. that the *ex parte* interim injunction and order contained in the Order of this Honourable Court dated 15th October be set aside and/or discharged;
2. that the statement of claim be struck out and/or set aside under O. 18 r. 19 of the Rules of the High Court 1980 on the grounds that:
   a) it discloses no reasonable cause of action;
   b) that it is scandalous, frivolous and vexatious; and
   c) that it is an abuse of the process of the Court.
3. that the defendant be granted an extension of time until fourteen (14) days of this Honourable Court ruling on prayer 2 herein to file and serve the defendant's defence, if necessary;
4. that the plaintiff do provide the defendant security for costs in this action in the sum of RM100,000 or such sum as this Honourable Court deem appropriate within seven (7) days from the date of Order failing which the *ex parte* interim injunction dated 15 October 1993 shall be discharged and all further proceedings on the part of the plaintiff be stayed;

5. that the plaintiff do provide the defendant with security for damages in the sum of RM5,000,000 by way of banker's guarantee or such sum and/or mode of payment as this Honourable Court shall deem fit and proper;

6. that the damages on the plaintiff's undertaking be assessed by the Deputy Registrar and paid by the plaintiff to the defendant;

7. that the cost of and incidental to this summon be paid by the plaintiff to the defendant forthwith and in any event before the trial of this suit; and

8. such other relief as this Honourable Court deem fit and proper.

At the hearing of the application, Mr. M. Nagarajah, Counsel for the defendant raised a preliminary point namely the *ex parte* order obtained by the plaintiff on 15 October 1993 had lapsed by virtue of the amendment to O. 29 r. 2 of the Rules of the High Court, 1980. He submitted that the amendment was made on 2 October 1993 and gazetted on 1 November 1993. He said that he was relying on the new r. 2(B) of O. 29 which provides:

> 2(B) unless sooner revoked or set aside, an interim injunction obtained on an *ex parte* application shall automatically lapse at the end of two weeks from the date on which it is granted.

He added that since the above rule 2(B) is procedural in nature, it should have retrospective effect. He said that the amendment does not expressly state that it should not apply retrospectively. He contended that since O. 29 r. 2(B) applies retrospectively it would mean that the *ex parte* order obtained by the plaintiff on 15 October 1993 had lapsed.

Mr. Wong Sai Fong, Counsel for the plaintiff on the other hand submitted that O. 29 r. 2(B) does not have any retrospective effect. In support of his submission, he said he was relying on s. 30(1) (a), (b) and (d) of the Interpretation Act. He conceded that r. 2(B) was procedural in nature. The amendment was in effect made by way of repeal. He contended that s. 30(1) (a), (b) & (d) deals with substantive rights and not a procedural right. He therefore said that when the plaintiff obtained the *ex parte* injunction, the plaintiff had vested right and that such vested right gave the plaintiff a right to remedy. He further said in the present case there was a pending application for contempt of Court and if the amendment was to be construed retrospectively the alleged act of contempt would no longer amount to contempt. The result would be "putting right that which was wrong". He maintained that the plaintiff's right was protected and preserved under the *ex parte* order until set aside.

I shall begin by examining s. 30 of the Interpretation Act. Section 30(1) provides:

> 30. (1) The repeal of a written law in whole or in part shall not -
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> a) affect the previous operation of the repealed law or anything duly done or suffered thereunder; or
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> b) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law; or
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> c) affect any penalty, forfeiture or punishment incurred in respect of any offence committed under the repealed law; or
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> d) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment,
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> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been made.

Under s. 3 of the Act, the word 'amend' is define to include 'repeal' and the words 'written law' include subsidiary legislation. Subsidiary legislation means any proclamation, rule, regulation, order made under the Act of Parliament. The amendment to O. 29 was made by the Rule Committee under s. 17 of the Courts of Judicature Act 1964 with the consent of the Chief Justices of Malaya and Borneo. It is clear, therefore, that the amendment falls within the definition of the term 'the repeal of the written law' in s. 30(1) of the Interpretation Act. See *Malayan Banking Bhd. v. Siong Electronic Industries 91981) Sdn. Bhd.* [1994] 1 MLJ 704 @ 712.

The first question to consider is whether the amendment to O. 29 affects any right, privilege, obligation or liability, acquired, accrued or incurred that existed prior to the amendment. In the statement of claim, the plaintiff alleges that the marks and features of the get-up used on the defendant's product had passed off as the marks and features of plaintiff's product. The plaintiff is the manufacturer of health foods and drinks which includes "Ganoderma". The plaintiff's claim that they are the proprietor of the trade mark in relation to "Ganoderma".

On 15 October 1993 the plaintiff obtained an *ex parte* order restraining the defendant from importing into Malaysia for distribution, supplies and sales of the product ganoderma bearing the plaintiff's trade mark. The order also restrained the defendant from passing off ganoderma not of plaintiff's manufacture and distribution as and for ganoderma of the plaintiff's manufacture and distribution.

In my view, the plaintiff by filing the writ is seeking the remedy of the Court to protect what it claims to be its right. The interim injunction granted on 15 October 1993 is an interim order to protect the plaintiff's right. When Mr. Nagarajah raised the preliminary point, the *ex parte* order had not been set aside.

It is axiomatic, that the power of the Court to grant an injunction can only be exercised in support of a right which the plaintiff has or at any time for interlocutory purposes, show that he probably has such right. See *Fennbend Ltd v. Millar* [1988] 20 HLR 19 at 22. Mr. Wong Sai Fong rightly submitted that the plaintiff's right was protected and preserved under the *ex part*e order until the order is set aside.

In my view, the plaintiff, by filing a writ and statement of claim and by obtaining the *ex parte* order had a vested right prior to the amendment, and the amendment therefore should not affect such right. In the absence of any express words in the new r. 2(B) of O. 29 that it should apply retrospectively, the *ex parte* order therefore must be construed to apply prospectively.

The position at common law is also the same. In *Malayan Banking Bhd. v. Siong Electronic*, I said, after considering the relevant authorities, that an amending statute could not be construed retrospectively if it effected any right that existed before the amendment. If the amending statute had the effect of altering a substantive law or removing a substantive right, it should not also be construed retrospectively.

The above conclusion is supported by the Privy Council decision in *Yew Boon Tew v. Kenderaan Bas Mara* [1982] 3 All ER 833 where Lord Brightman at p. 836 said:

> apart from the provision of the interpretation statute, there is at common law, a *prima facie* rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used.

Under s. 30(1)(a), the amendment should not affect the previous operation of the repeal law or anything duly done or suffered thereunder. In the present case, the writ was filed and the

ex parte injunction was obtained under the law that existed before the amendment. In the circumstances of the present case the amendment should not apply retrospectively.

Subsection (1)(d) of s. 30 allows legal proceeding which was instituted before the amendment to continue despite the amendment. In the present case, apart from filing the writ and obtaining the *ex parte* order, the plaintiff has also filed an application for contempt proceedings. Mr. Wong Sai Fong rightly submitted that if the amendment was to be given a retrospective effect, the act of contempt would not amount to contempt anymore. In other words, it will be putting right that which was wrong. Lord Blackburn in his speech in *James Gardner v. Edward A. Lucas and Others* [1878] 3 AC 582 page 604 said:

> My ground for saying that the 39th Section is not retrospective is that, if it were retrospective it would have the affect of making that a valid contract which, as the law stood at the time it was executed, was not valid at all.

I respectfully agree with the statement of Lord Blackburn.

For the reasons stated above, I overrule the preliminary point raised by Mr. Nagarajah. The *ex parte* order granted on 15 October 1993 still remains in force until it is set aside by this Court.